

Justices Roberts and Alito: The Confirmation Process

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by

Megan Sayers

The Ohio State University
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Project Advisor: Dr. Elliot Slotnick, Department of Political Science

Overview

The Supreme Court is the ultimate interpreter of the meaning of the law in the United States. For this reason, nominations and confirmations of Justices to the Supreme Court of the United States have always been an important process. By being able to distinguish the confirmation processes for these nominees from one another, a more complete comprehension of the nomination process as a whole will further the understanding of the court, as well as its interactions with the other branches of the American government. The objective of this thesis is to compare and contrast the confirmation processes of Justices Roberts and Alito, exploring the reasons why the senate roll call vote for the two justices were so different, even though both candidates were confirmed. Justice Roberts was confirmed 78-22, while Justice Alito was confirmed by a 58-42 vote. What accounts for this startling 20-vote difference in the senate's voting? Essentially, the central hypothesis of the thesis is that several factors contributed to the greater divisions surrounding Alito's confirmation versus the relative consensus by which Roberts was chosen, despite the fact that both are considered to be strong conservative judges. These factors include the character and personality of the nominees, the timing of their nominations, judicial philosophy, the record created by their prior written opinions, interest group politics and the political balance on the court at the time of their nominations. These factors will be examined in relation to the voting patterns in the two confirmation processes. Also, an examination of nominations through the perspective of George Watson and John Stookey's study titled "*Supreme Court Confirmation Hearings: a view from the Senate*" will be conducted in order to place

Senators in their situational roles and corresponding goals during the nomination and confirmation processes.

This study will first present background information on the nomination process as a whole. It will explore past nomination processes and the now highly publicized and politicized nature of the confirmation hearings. Both nominees will then be viewed and analyzed in terms of their legal careers and within the context of the factors discussed above. Following will be an in-depth examination of the senate roll call vote. More specifically, senators will be placed into six categories:

- 1). Republicans voting “yes” on both nominations (54)
- 2). Democrats voting “no” on both nominations (22)
- 3). Republicans voting “no” on both nominations (0)
- 4). Democrats voting “yes” on both nominations (4)
- 5). Democrats voting differently on the two nominations (19)
- 6). Republicans voting differently on the two nominations (1)

The first two categories of senators are the expected modes of voting and thus will require less explanation than the remaining categories. Not surprisingly, no Senators meet the criteria of category 3. Most of my analysis will focus on categories four through six, as these are the most intriguing and should be examined in greater depth.

Independent Senator Jeffords’ votes will be also taken into consideration and, for purposes of this research; he will be treated as a Democrat since he caucused with the Democrats. Further analysis will be conducted examining the relationship between Senate party affiliations and actual votes cast. In order to place the justices into their respective liberal or conservative ideologies, data will be examined from past studies in

which the voting patterns of each justice in his circuit court behavior were analyzed.

These ideologies will be related to the examination of the Senate roll call votes and, in particular, to those Senators who fall outside the mode of the roll call data. A chart summarizing the roll call voting data will be included with the discussion

(http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00245 and

http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00002).

To better understand the Senate roll call, interviews were conducted with several actors involved in the confirmation process, including staff members of the Senate Judiciary Committee and representatives of interest groups such as the Alliance for Justice. Also, I will have access to interviews that were conducted by my thesis advisor, Dr. Elliot Slotnick, in Washington D.C. as well. By collecting information from primary sources, including the congressional record, in depth knowledge can also be used to enhance the examination of the Senate roll calls on both justices.

The analysis will conclude with a detailed case study of Rhode Island Republican Senator Lincoln Chafee and his decision to vote “yes” on Chief Justice Roberts and “no” on Justice Alito. Senator Chafee’s vote is especially interesting due to the fact that he was the only Republican to vote differently on the two nominations. Other case study examinations of those senators who fell outside of the mode of data will focus on Senator Jeffords, who voted yes on Roberts and no on Alito, Democratic Senator Byrd, who voted yes on both nominees and Democratic Senator Leahy, who voted yes on Roberts and no on Alito.

An analysis of primary source material will be used as the chief methodology in the research process. These materials include Senate confirmation hearings (questions and answers), interviews with various players in the confirmation process, congressional record statements made by the senators themselves and an analysis of the partisan voting behavior. News media coverage will be used as a secondary source and will help to further understand the senators' actions and the reasons for their votes.

Nomination Process Background

For purposes of this paper, a background discussion of the Supreme Court and its powers is useful. Article III of the United States Constitution states "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" (US Constitution, Article III, Section 1). Thus, the federal court system is established with these words. However, the only component established in this legal system is the Supreme Court; all others are left to the discretion of Congress. Left to similar discretion are issues such as the size of the court itself; today, eight associate justices and one chief Justice make up the nine members of the court. Originally, the court was made up of six members (Maltese 22). The Supreme Court is a unique legal body in that it has the distinct power of having both original and appellate jurisdiction. Congress, however, has the power to limit the appellate jurisdiction of the Court as it sees fit. The Court is also unique in that it has the ability to select which cases it wishes to hear. The court, in effect, sets its own policy agenda. By granting writs of certiorari, the Justices are able to leave their stamp on American history and decide upon those cases that they deem most important to

American society. Given these characteristics, it is easy to understand the importance and power of the court.

It is important to note, however, that the Supreme Court has not always been viewed as a glamorous body with substantial power. In fact, the first Supreme Court Chief Justice, John Jay, left the court to pursue a more esteemed career as the governor of New York. In the 1803 decision of *Marbury v Madison*, the Supreme Court gained the respect and the authority that it holds today when Justice Marshall developed the concept of judicial review, allowing the court to review the constitutionality of the actions of other branches.

The nomination and confirmation process as a whole is structured by the Constitution's advice and consent clause. Specifically, the clause states "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law...". (US Constitution Article II, Section 2, Clause 2). The advice and consent clause was a compromise between those who favored the appointment power being lodged exclusively in the executive and those who favored the appointment power being lodged exclusively in the Senate. Arrived at by the Philadelphia Convention delegates, it ensures that when a vacancy arises on the court, the President and Senate must work together in order to fill it (Epstein and Segal 8). Hence, the Advice and Consent clause explains how there has long been a debate in American politics concerning the judicial confirmation processes while establishing the inherent tensions between the two branches.

Since the late 1960's, five Supreme Court nominees have failed to be confirmed (Maltese 139). Moreover, to date, the Senate has failed to confirm 27 out of the total 147 Supreme Court nominees, equating to roughly 18% of all nominees (Epstein and Segal 20). Henry Abraham states, "a number of candidates were rejected because of Senate opposition to the nominating chief executive" (Abraham 28). Tied to this statement is the notion that the nomination and confirmation process is political and can be examined in terms of an internal tension between political parties. Epstein and Segal explain how Senators who feel that the nominee's judicial philosophy or political views are incompatible with theirs will even risk going against the actions of their party in order to fulfill the wishes of their home state constituents (Epstein and Segal 2). Republican Lincoln Chafee's decision to vote "no" in the senate roll call confirmation vote of Justice Alito is an example of such a departure, and will be examined in a case study in the following pages.

Prior to the current confirmation scheme, other plans were considered. The original confirmation process proposed for the court was part of the Virginia Plan, which included an appointment by both the Senate and House (Maltese 19). Lower court nominees are also nominated and confirmed by the Senate, however little attention is focused on their confirmation due to their local and regional organization (Goldman 1). Under Article II Section 2 of the United States Constitution, the President holds the power to appoint nominees to the court (Maltese 10). Maltese further asserts that nominations as a whole may be a test of presidential strength and that in general, presidents who are considered "weak" have a more difficult time of securing

confirmation (Maltese 5). Furthermore, “Presidents now use judicial appointments as part of their growing arsenal of resources for influencing public policy” (Maltese 160).

In terms of the two confirmation battles we are focusing on for Justices Roberts and Alito however, a “weak” characterization of President Bush does not explain the differences in the roll call. The confirmation process of a potential justice begins when the President’s advisors investigate and compile a list of potential nominees. These advisors include the President’s chief of staff, the attorney general, and other top officials (Segal and Spaeth 179). The opinions of interest groups and other legal professionals as to who should be nominated are often expressed to the Department of Justice and sent on to the President’s staff (Segal and Spaeth 180). This list is almost always comprised of potential nominees who are members of the President’s political party (Abraham 48). This partisan party nomination has been characterized as being “nothing wrong in a president’s attempt to staff the court with jurists who read the constitution his way” (Abraham 328). Moreover, vacancies on the bench can serve as a means for a president to leave his mark on American history. The President takes into account several factors in the nomination process. Henry Abraham cites three factors that are influential in the selection process. These factors include 1). The American Bar Association, 2). The Supreme Court Justices currently on the bench, and 3). The public and private interests in the process (Abraham 18). In addition, Segal and Spaeth include factors such as ideology, political environment, region, religion, race, sex, experience and patronage (Segal and Spaeth 184). While the constitution does not specify any qualifications for being a member of the court (Maltese 18), all justices of the Supreme Court have or had their Juris Doctorates (Abraham 35).

The nomination and confirmation process continues when the nominees are then sent questionnaires about their personal lives and careers that are then sent to the Department of Justice, as well as, historically, to the American Bar Association. Also, The Federal Bureau of Investigation conducts a background check on the nominees, ensuring that there are no criminal pasts associated with them. After evaluating the questionnaires, the ABA issues a formal report on the nominees. It is important to note that these formal reports do not focus on the nominee's political philosophy. Instead, these reports are designed to only evaluate the nominee's professional standing and fitness as a federal judge (Epstein and Segal 71).

Historically, the Presidents have relied on the ABA for its rating of potential justices as "well qualified", "qualified" and "not qualified". It should be noted that both Justice Roberts and Alito received "well qualified" ratings, even though their Senate roll call votes were substantially different (<http://www.msnbc.msn.com/id/10707788/>). Moreover, since Eisenhower's presidency, less than 1.5% of nominated judges have been given a "not qualified" rating by the ABA (Epstein and Segal 71). Thus, most of the nominees are viewed as qualified, even though some are not confirmed.

Recently, there have been some changes in the American Bar Associations role in the nomination and confirmation process. Our current President, George Bush, has not relied on the ABA and has even terminated the ABA's role in the confirmation/nomination process by not releasing the name of his nominees in advance to the association (Epstein and Segal 74). It is important to note, however, that presidents of both dominant political ideologies have had their differences with the American Bar Association (Maltese 128). Hence, prior to President Bush's term in office, The

American Bar Association would issue a full formal report on the nominee. After the issue of a formal report by the American Bar Association, the nominee is then questioned by the Senate Judiciary Committee in a formal hearing setting. The committee then votes, and if the nominee passes this stage, he/she is sent to the Senate for a full vote (Epstein and Segal 21). At the full Senate vote, Senators who are opposed to the nominee may attempt to filibuster the nominee in the hopes of preventing a full vote on the floor (Epstein and Segal 98). When questioned, nominees often do not fully answer the questions directed at them from the senators. For example, Judge Frankfurter would not directly answer the questions directed at him during his hearings in regards to his alleged communist involvement (Maltese 106). Both Justices Alito and Roberts were accused of dodging questions, although Justice Alito had more of a judicial record to account for and was thus more likely to be characterized by Senators and interests groups with providing inaccurate responses.

Leading up to the confirmation vote, President's often use their staff in an effort to influence Senators and their votes (Maltese 117). These votes are available to the public, which in turn could be an influence on a Senator's confirmation vote (Maltese 53). Further, change in the Senate Procedural rules in 1929 allowed for debate over the nominations on the open Senate floor, which has contributed to the increased involvement of interest group activity (Maltese 37). Full votes can range anywhere from a landslide to a close call. For example, Justice Ginsberg's confirmation vote was 96-3 (Maltese 98). In contrast, Justice Thomas was confirmed with a vote of 52-48, which was the closest margin of vote of the 20th century (<http://www.supremecourthistory.org/myweb/justice/thomas.htm>).

The judicial confirmation process has always been political, despite the idea that the judicial branch is politically independent from the two remaining branches of government. The mobilization of public support is key in respect to all the players in the process (Maltese 86). Moreover, Maltese asserts that political motivations were even present in the confirmation process as far back as the 19th century (Maltese 31). Specifically, they came into the realm of judicial confirmation in 1881, although they have had the most involvement since the 20th century (Maltese 37). Epstein and Segal attribute this quality to the fact that justices themselves are political and that the appointment process is characterized by ideological and partisan concerns (Epstein and Segal 4). Recently, the confirmation process of the court has become more politicized and publicized. The first public hearings for nominations occurred in 1916 with the confirmation of Justice Brandeis. Also, to date, these hearing have been longer in length than they were previously. In addition, the media is playing a larger role in the confirmation process than it historically has. Moreover, testimony by nominees has only been televised since 1981 (Maltese 93).

Also tied to the increase of politics and publicity are the role of interest groups in the confirmation process. Thus, there is much more public concern over the confirmation and nomination processes, which adds to importance placed on nominees in the processes. The roots of interests groups and their roles in the judicial confirmation process can be traced back to sometime shortly after the civil war (Maltese 22). Interest groups formed in an effort to promote or contest a nominee in accordance with the organization's core beliefs and values. Examples of such groups today include the Alliance for Justice and People for the American Way on the left and the American

Conservative Union on the right. These organizations attempt to use the media as a tool to provide the public and other governmental actors with information on judicial nominees. The groups even compile reports that are later published for the public outlining key cases and voting tendencies of the justices. (See, for example, www.afj.org.) Often included in these reports are politically charged statements concerning the nominee's character in relation to how he/she will rule on the federal bench.

The first example of successful interest group blocking of a nominee occurred in 1881. Stanley Matthews was unsuccessful in this confirmation due in some part to the efforts of the interest group the Anti Monopoly League. Prior to this example, interest groups voiced concerns over their distaste for a nominee through letters to the President (Maltese 52). Another prominent and more recent example of interest group involvement and opposition of a nominee can be seen with President Reagan's nomination of Robert Bork. The People for the American Way, Alliance for Justice, Women's Legal Defense Fund and other groups strongly contested the confirmation of Judge Bork. By attacking his prior judicial decisions, these groups were able to draw attention to personal character qualities in Bork's opinions and his extreme conservatism that many Americans found disturbing and incompatible with American values. Even though these groups alone did not independently defeat Judge Bork, they certainly played a role in his failure to be confirmed (Segal and Spaeth 196).

Since the failed confirmation of Robert Bork, interest groups have played a role in the process by voicing their concerns through the Senate Judiciary Committee hearings (Maltese 92). Indirectly, Justice Alito's confirmation can be examined in relation to

Robert Bork's. Both judges had confirmations that centered around the replacement of a "swing" vote on the court (Maltese 139). Examples of other past failed nominees include Douglas Ginsburg, G. Harrold Carswell and Clement Haynesworth (Segal and Spaeth 191). Most recently, we have the failed nomination of President Bush's White House Counsel, Harriet Meiers.

The Alliance of Justice has also published reports on both Justices Roberts and Alito during their confirmation processes. The interest groups report on Justice Alito characterized him as a judge who "has aggressively sought to curb Congress' legislative authority to tackle issues of national importance..." (Alliance for Justice Preliminary Report 1). By attacking Justice Alito's actions and past rulings, interest groups can be influential by simply bringing cases and issues to the attention of Senators and the American public as a whole. An analysis of both Chief Justice Roberts and Justice Alito in relation to these political interest groups will be conducted in the following pages.

Chief Justice John Roberts

On September 9, 2005, Chief Justice Roberts was sworn in after being nominated by our current President George W. Bush and being confirmed by the Senate (<http://www.supremecourtus.gov/about/biographiescurrent.pdf>). He replaced the conservative Republican Chief Justice Rehnquist whom he formerly served as a law clerk. Chief Justice John Roberts is the youngest man in over 200 years to be confirmed to the Supreme Court as Chief Justice. Moreover, "Roberts received more Senate votes supporting his nomination (78) than any other nominee for Chief Justice in American history" (<http://usgovinfo.about.com/od/uscourtsystem/a/bioroberts.htm>). The correlation

between Roberts' young age and historic Senate support is peculiar in that justices, as mentioned previously, are appointed for life terms. One would think that with a nominee so young in age and with limited judicial experience, as well as a conservative ideology and reputation, much more opposition from the Senate would have occurred. Moreover, both Roberts and Alito are viewed as members of the ultra-conservative wing of the Republican Party, so one would assume that Senators from the left would oppose a nominee more strongly who could potentially leave their stamp on American judicial proceedings for many years to come. Empirical research compiled by Jeffrey Segal supports this notion that both nominees are conservative in nature. Segal rated the Justices on a scale from 0 to 1.0 in terms of their political ideology. 0 is the most conservative, whereas 1.0 is the most liberal. Roberts has a score of .120 and Alito has a score of .100, making the two not substantially different in political ideology. A table illustrating Segal's work can be found on the next page.

Supreme Court Justices Segal/Cover Scores

Justice	Ideology Score
Rehnquist	.045
O'Connor	.415
Ginsburg	.680
Breyer	.475
Kennedy	.365
Souter	.325
Stevens	.250
Thomas	.150
Roberts	.120
Alito	.100

*Information obtained from <http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf>

Roberts was born in Buffalo New York in 1955 and obtained his law degree from Harvard Law School. Although Roberts did not have lengthy experience as a judge prior to being confirmed to the Supreme Court, he has held numerous governmental and private positions in the legal field. He was former Chief Justice Rehnquist's law clerk, as well as Principle Deputy Solicitor General. In the few years before he was appointed and confirmed to the high court, Roberts practiced law for the Hogan and Hartson Law Firm and ultimately was appointed to the District of Columbia Circuit Court of Appeals. He also has extensive experience arguing before the Supreme Court on behalf of the federal government and as a private litigator.

It has been asserted by players in the confirmation process on Capital Hill that Justice Roberts' support in the Senate roll call can be attributed in part to his personality and character. For example, in an interview conducted with a Republican Senate aid revealed that the Senate Democrats did not really want to vote for Roberts, but that they almost somehow had to due to the fact that it was difficult to vote "no" on a nomination like Roberts. Specifically, the aide labeled Roberts' personality as polished (Interview 3/23/3007). Further, the aide stated that Senators and the legal community "fell in love" with Roberts during his speeches and individual lunches with members of the Senate. The aide dubbed him as poetic and further described how Roberts had the ability to sweep people up with his simple use of words. Roberts' ability to captivate an audience, whether it be simply a single senator or the Senate as a whole, was a major key in his support in the roll call votes (Interview 3/23/2007).

Members of the interest group Alliance for Justice, which opposed Roberts, also cited his personality and character as having been essential in gaining more support from

the Senate than that of Alito. For example, President of Alliance for Justice Nan Aron stated that Roberts was the “darling of the Washington legal establishment. The press liked him, the lawyers liked him...” and that he was “...smart, very engaging, handsome, well spoken. Senators were impressed by what the lawyers had to say about him.” (Nan Aron Interview 3/21/2007). Further, Vice President of the organization, Paul Edenfield, explained how Roberts was popular among the Washington D.C. legal community and that this popularity played a role in the outcome of the Senate roll call votes. Edenfield further clarified how “no one denied he was a nice guy”. In comparison, due to the fact that Judge Alito had been serving on the third circuit court for fifteen years, he had been outside the Washington D.C. community and the elite legal field within it. This absence from the community ultimately caused Judge Alito to lack the same popularity among these elite lawyers. These elite lawyers, Edenfield explained, had influence over the Senate. As a result, Alito did not have the same support than Roberts had (Paul Edenfield Interview 3/21/2007).

Justice Roberts was originally nominated to replace the retiring Justice Sandra Day O’Connor. However, the sudden death of Chief Justice Rehnquist allowed President Bush to nominate Roberts to the Chief Justice position, thus opening up two vacancies on the Court (<http://www.cnn.com/2005/POLITICS/09/05/roberts.nomination/index.html>). By replacing a justice who is characterized as a strong conservative, the political composition of the Court was only marginally affected by his confirmation. This situation is different from the one Alito encountered, which accounts for some of the differences in the roll call votes. Justice Alito replaced Justice O’Connor, who was referred to as the “swing vote”. Thus by replacing a swing vote with a conservative vote,

Bush had the opportunity to shift the balance of power on the makeup of the Court. Manning describes this relationship when he states "...in many ways O'Connor's departure allowed Bush the opportunity to have an even greater impact on the Court by giving the President the chance to replace a crucial swing vote on the bench" (Manning 2). Although empirical evidence is not available to support this assertion, the speculation can be made that Roberts would have in fact faced greater opposition if Chief Justice Rehnquist had not died and instead, he was nominated to replace Justice O'Connor.

The charts below summarize the voting tendencies of Justices Rehnquist and O'Connor in civil rights issues. They were obtained from the Supreme Court Database compiled by Harold Spaeth. The charts show the percent of the time that the justices voted liberally or conservatively in all civil liberties cases from the 1981 to the 2005 terms. Frequencies of liberal and conservative votes were run in the area of civil liberties issues due to the fact that civil liberties are an area of law in which types of votes (liberal and conservative) weigh heavily in the outcome cases. By looking at the charts, one can see that O'Connor and Rehnquist had different voting records and that Rehnquist (77.1%) voted substantially more often in a conservative direction than O'Connor did (65.3%) (Harold Spaeth Database). Related to these findings from the Spaeth database are the Segal cover scores of both Chief Justice Rehnquist and Justice O'Connor. These scores illustrate the clearly different voting records and ideologies of both Justices. Segal gave O'Connor a score of .415, while giving Rehnquist a score of .045. Thus, there is a clearly substantial difference in the two and their replacement with the two new nominees would cause some concern.

**TABLE 1: % CONSERVATIVE AND LIBERAL VOTES CASE BY JUSTICES
REHNQUIST AND O’CONNOR IN CIVIL LIBERITIES CASES FROM THE
1981-2005**

	% Liberal Decision	% Conservative Decisions
Chief Justice Rehnquist	22.9%	77.1%
Justice O’Connor	34.7%	65.3%

*Information obtained from Harold Spaeth Database.

Due to his credentials and limited amount of time served on the Washington D.C. Circuit Court of Appeals before he was nominated (two years), most of the opposition that came from Democratic Senators focused on extracting whatever aspects of Roberts’ political ideology from the judge’s sparse judicial voting records that they could. However, Roberts undoubtedly has ties to and identifies with the Republican Party, which is expected due to President Bush’s political party affiliation. Due to this limited judicial voting record, opponents of Roberts knew that they would have great difficulty in rallying support for his defeat. They instead, as shown with the differences in the role call, focused their attention and prepared for a new nomination. This attention was channeled to Alito and his substantial conservative circuit voting record. Moreover, Paul Edenfield, when interviewed, stated that one of the main differences for the divergence in

the Senate roll call votes between the two justices was due to the fact that Roberts lacked a public record while Alito had a fifteen year one. Further, Edenfield asserted that Alito's fifteen year record allowed for the interest group to characterize him with more ease due to the fact that the record allowed for clear voting patterns to be extracted (Paul Edenfield Interview 3/21/2007).

Kenneth Manning's study on the ideology of Justice Roberts uses the justice's past rulings on cases to group Roberts' positions into categories. Overall, Manning's findings show that Roberts is "...very conservative in his decision making in criminal justice disputes, and the data suggest that he is exceptionally conservative in civil liberties and rights cases. In labor and economic disputes, however, Judge Roberts has been more liberal than the appellate court average" (Manning 1). The pie graphs below were obtained from Kenneth Manning's study titled *How Right is He? A Quantitative Analysis of the Ideology of Judge John Roberts*. The graphs illustrate Justice Roberts' conservatism with the percentage of liberal and conservative decisions made by Roberts in different case types.

**TABLE 2: PERCENTAGE LIBERAL AND CONSERVATIVE DECISIONS BY
JUDGE JOHN ROBERTS IN THREE CASE TYPES**

	Criminal Justice %	Civil Rights & Liberties %	Economic Activity & Labor Regulation %
Liberal	13.6% (6)	15.4% (2)	55.7% (39)
Conservative	86.4% (38)	84.6% (11)	44.3% (49)
U.S. Ct. of Appeals Average Percentage Conservative Votes	79.2%	58.8%	48.3%

Odds Ratio (α)

$\alpha = 1.66$

$\alpha = 3.85$

$\alpha = .85$

N's reported in parenthesis

* The number of civil liberties and rights cases by Roberts is too low to make statistically valid comparisons. Data are presented for reference purposes.

** Chart obtained from Kenneth Manning's *How Right is He? A Quantitative Analysis of the Ideology of Judge John G. Roberts* 2005.

Half of the Democrats (22) voted to confirm Roberts, which reflects a belief of Senators that he was not as far to the right as seen in the subsequent voting of Judge Alito. Tied to this is Manning's findings that Roberts is not as conservative in economic and labor disputes as the average appellate court judge. Furthermore, during Justice Roberts' work for the private law firm Hogan and Hartson, Justice Roberts was involved

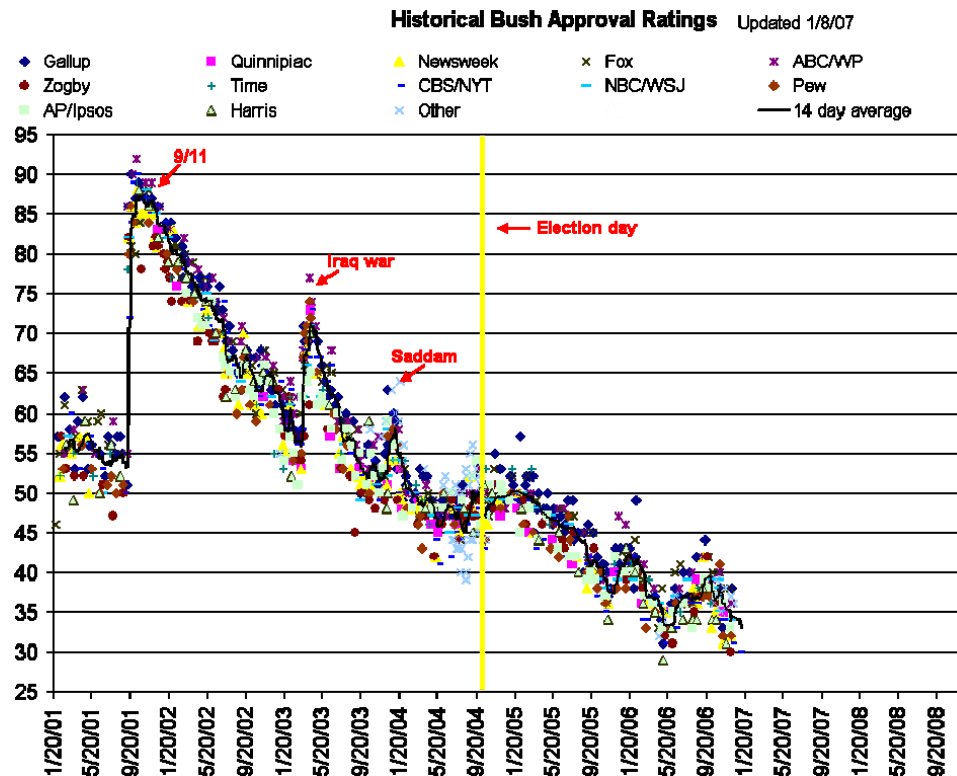
in the case *Lawrence v. Texas* (539 U.S. 558) in which he did pro bono work for a gay rights group. Manning also asserts that Roberts has had a history of backing away from issues such as school prayer and abortion, which can be viewed as hallmarks of the right (Manning 5).

Interest groups, as mentioned previously, play a major role in the confirmation process. Both the Alliance for Justice and People for the American Way have published reports and voiced opinions over Justices Roberts and Alito. However, both groups appear to be harsher in their evaluations of Alito compared to Roberts. This can be attributed to the lack of prior court decisions and replacement of a conservative Chief Justice Rehnquist with a roughly equal conservative Justice Roberts. Specifically, the Alliance for Justice addresses this issue in their preliminary report when they assert, “Judge Roberts’ limited public record raises concern”

(http://www.allianceforjustice.org/research_publications/research/john_roberts_report.pdf, 1). Overall, The Alliance for Justice portrayed Roberts as a successful Republican who raised some concern. People for the American Way also voiced concerns over the limited amount of cases that Judge Roberts had participated in. They do, however, refer to him as hostile and conservative. (<http://media.pfaw.org/roberts.pdf>, 1). The group also mentioned that Justice Roberts was quiet during his hearings. However, as mentioned previously, both groups could not provide as much evidence in their reports due to his lack of time spent on the federal bench.

Lastly, an examination of the environmental factors and Presidential strength surrounding Justice Roberts’ confirmation is useful in ruling out possible influences in the process that might account for the differences in the roll call votes. The graph below

displaying President Bush's approval ratings illustrates the similarity in approval ratings in both September 2005 (Roberts' confirmation) and January 2006 (Alito's confirmation). Thus, the argument cannot be contended that the difference in the roll call votes is attributed to a difference in Presidential strength or popularity.



** Chart obtained from <http://www.hist.umn.edu/~ruggles/Approval.htm>.

Possible environmental influences that could account for the difference in the votes can also be examined in the context of Presidential strength. For example, if several events were occurring that could potentially effect the political environment, it would, in theory, be easier or more difficult for the President to secure a confirmation. One major event that occurred in September 2005 was Hurricane Katrina. This event is

particularly important to the notion of possible environmental influences due to the fact that the American public was devastated over this natural disaster. Although no empirical evidence supports this claim, one can speculate that this disaster may have enabled Justice Roberts to get confirmed with more ease than his colleagues. Specifically, with the attention of the nation focused on the hurricane and its destruction, the President was able to send his nominee through the Senate confirmation process with ease.

Moreover, a statement by Senator Leahy supports this argument. Specifically, in Leahy's statement on the nomination of Roberts he explained "Fewer than 36 hours after the announcement of the passing of Chief Justice Rehnquist and during the horrific aftermath in the week following Hurricane Katrina, the President withdrew that July 19 nomination to be Associate Justice. Thereafter, the White House sent us this alternative nomination, for Judge John Roberts to become the Chief Justice of the United States, and I cooperated with Chairman Specter in an accelerated consideration of the nomination" (<http://leahy.senate.gov/press/200509/092105.html>). The war on terror is another event that can be examined in relation to the confirmation process. One would think that a disapproval of the war from at least some of the American public would affect Bush's confirmation. However, it does not explain the differences in the roll call votes seeing as that it was still occurring from September 2005 to January 2006.

Justice Samuel Alito Jr.

Justice Samuel Alito was born April 1st 1950 in Trenton New Jersey. His educational background includes a bachelor's degree from Princeton University and a law degree from Yale University. In terms of political ideology, Dana Bash explains, "legal experts consider Alito a solid conservative" (www.cnn.com/2005/POLITICS/10/31/scotus.bush.index.html 3). Unlike Justice Roberts, Alito had extensive experience serving on the bench. Moreover, this extensive experience on the bench has been used as evidence to support the claim that Justice Alito was actually a more qualified Justice than his colleague Chief Justice Roberts. In the interview mentioned previously with an aide to a Republican Senator, the aide stated that Alito's experience on the bench made him more qualified to be a Justice than Roberts (Interview 3/23/2007). Specifically, he had a 15-year tenure on the federal Court of Appeals serving the 3rd Circuit. Prior to his service on the bench, Alito was a clerk for Judge Garth on the 3rd Circuit Court of Appeals. Along with his work on the 3rd Circuit, Alito has also served as the US attorney for New Jersey's district, Assistant Solicitor General and Deputy Assistant Attorney General. (<http://www.whitehouse.gov/infocus/judicialnominees/alito.html>). On January 31st, 2006 Judge Samuel Alito was sworn in as the 110th Justice to the Supreme Court. Most importantly, Justice Alito replaced Justice O'Connor, who has been dubbed by many as the moderate swing vote (<http://www.cnn.com/2006/POLITICS/01/31/alito/index.html>).

For purposes of examining statements concerning opposition to Judge Alito's nomination, a review of his judicial record is necessary. Having served 15 years on the 3rd Circuit Court of Appeals, opposition from the left was able to extract Judge Alito's

judicial philosophy and stance on important issues by examining his extensive history of past rulings. For purposes of this study, an examination will be conducted using data obtained from the Washington Posts' article, *Alito, In and Out of the Mainstream* by Amy Goldstein and Sarah Cohen. Specifically, the data consists of 221 divided ruling cases in which Judge Alito participated. Of these 221 cases, Alito wrote 55 dissenting and 34 majority opinions. Overall, the pair found that "Samuel A. Alito Jr. has been highly sympathetic to prosecutors, skeptical of immigrants trying to avoid deportation, and supportive of a lower wall between church and state"

(<http://www.washingtonpost.com/wp-dyn/content/article/2005/12/12/AR2005123100328.html> 1). In areas of religion, Judge Alito's record shows that he has a steady record of voting to broaden the scope of religion in the lives of the American public (<http://www.washingtonpost.com/wp-dyn/content/article/2005/12/12/AR2005123100328.html> 4). Also concluded in the study was Alito's tougher stance than that of typical appellate judges on criminal cases. More importantly, however, may be Alito's rulings on issues of civil rights. Alito ruled against those claiming discrimination in 75% of the civil rights cases brought before him.

(<http://www.washingtonpost.com/wp-dyn/content/article/2005/12/12/AR2005123100328.html> 1).

Recall that Justice O'Connor, although reliably conservative, was somewhat more liberal on issues involving civil rights. Therefore, with the nomination of Judge Alito, President Bush had the opportunity to change the political composition of the court in issues that the majority of the American public deems important to society. The New York Times reported that "The nominee's critics say his record as a judge, and his earlier

work as a lawyer in the Reagan administration, signal that he would tilt the tribunal further to the right, in favor of presidential power and big business and away from personal freedom and the rights of ordinary Americans”

(<http://www.nytimes.com/2006/01/30/politics/politicsspecial1/30cnd-alito.html>). This issue was also addressed in the interview conducted with Paul Edenfield with Alliance for Justice. Specifically, Edenfield held that the replacement of moderate swing Justice with a conservative Justice played a role in Alito getting more opposition in terms of Senate roll call votes than Roberts did. Further, Edenfield explained that the political balance on the court “was a very significant thing that people looked to” (Paul Edenfield Interview 3/21/2007). Greenburg’s discussion of Alito’s confirmation also supports this argument. Greenburg writes “most of the Senators who opposed Alito wanted to talk about the opinions that he’d written as an appeals court judge. *Casey*, the abortion case, was the big one. But Alito had written a number of others in areas where O’Connor’s vote had made a difference, especially in the area of states’ rights and criminal law” (Greenburg 303).

Judge Alito’s rulings in criminal cases also provided reasons for the left to oppose his nomination. Goldstein and Cohen’s investigation found that “of 33 such cases in the analysis, he sided with criminal defendants only three times, aligning with prosecutors more often than the average GOP- appointed judge in divided cases”

([Http://www.washingtonpost.com/wp-dyn/content/article/2005/12/12/AR2005123100328.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/12/12/AR2005123100328.html) 3). Moreover, in death penalty cases, Judge Alito has never voted to issue a stay or spare an inmate from execution. Related to this statistic is the difference in Justice O’Connor and Judge Alito’s take on

death penalty issues. In the recent years before her retirement, O'Connor had been voting to limit use of the death penalty in cases brought to the Supreme Court (Cohen and Goldstein 3).

Judge Alito's federal appellate record, however, does resemble that of the typical conservative judge in some areas. These areas include First Amendment decisions, as well as disagreement with the majority opinion in lawsuits by employees (<http://www.washingtonpost.com/wp-dyn/content/article/2005/12/12/AR2005123100328.html> 4). Further, the study also concluded that Alito upheld the lower courts' ruling roughly 50% of the time, which is also representative of judges in the Court of Appeals judges (Cohen and Goldstein 2). The charts and data below were obtained from Goldstein and Cohen's study summarizing Justice Alito's voting record on the 3rd Circuit Court of Appeals.

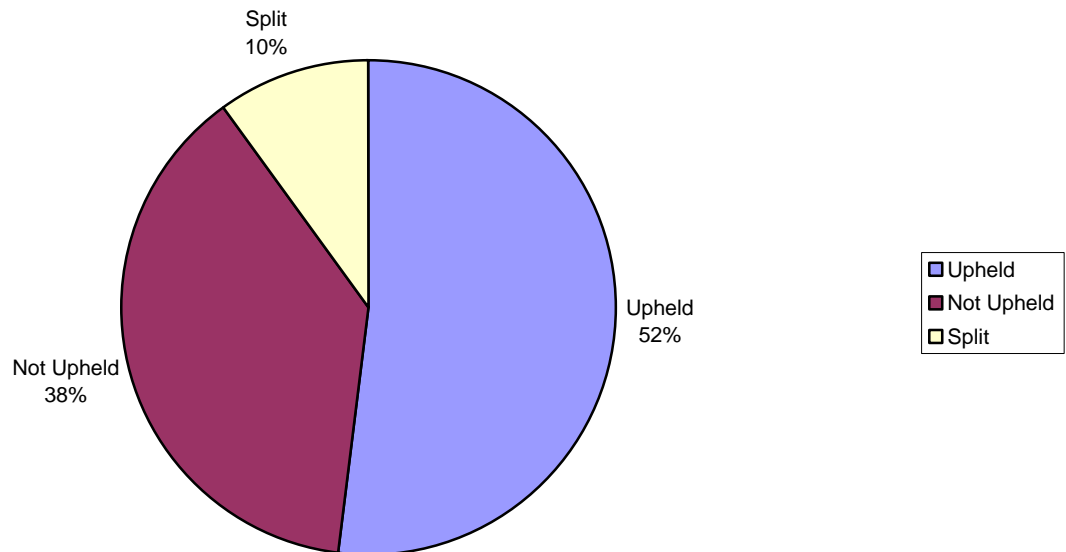
**Table 3: Voting Tendencies in 3rd Circuit Court of Appeals by
Judge Alito in Different Case Areas**

How Alito Voted...

Alito Voted with the Majority	Case Type		Split	
67%	Criminal Search, Trial and Sentencing	For Defendant 9% (3)	3% (1)	Prosecution 88% (29)
71%	Prisoners' Rights	For Prisoner 0% (0)	14% (1)	For government 86% (6)
13%	Immigration	For Immigrant 12.5% (1)	12.5% (1)	For government 75% (6)
50%	Union and Wage Disputes	For Union or Worker 50% (5)	0% (0)	For Employer 50% (5)
78%	Employee Benefit Disputes	For Worker 56% (5)	11% (1)	For Employer/Insurance Provider 33% (3)
71%	Race, Age, Sex and Disability Discrimination	For Claim of Discrimination 19% (4)	14% (4)	Against the Claim 67% (14)
63%	Government Regulation of Land use, Environment, Labor and Securities	For Government 44% (7)	0% (0)	For Property Owner or Employer 56% (9)
33%	Federal and Congressional Powers (States' Rights)	For More Federal Power 67% (2)	0% (0)	For Less Federal Power 33% (1)
33%	Church and State	For Less Religious Speech/Funding 0% (0)	0% (0)	For More Religious Speech/Funding 100% (3)

***N's Reported in Parenthesis**

Percentage Judge Alito Voted to Uphold Lower-Court Rulings in 183 Cases



**Chart obtained from Amy Goldstein and Sarah Cohen's *Alito, In and Out of the Mainstream*, January 1st, 2006

As discussed previously, Justice Alito is well known to the legal and political community as a conservative. Hence, President Bush's decision to nominate conservative Justice Alito's for the replacement of a moderate Justice O'Connor facilitated heated opposition from Democratic, as well as one Republican, Senators. Jeffrey Tobin describes the opposition from liberal groups as targeting Alito's philosophy, specifically his anti-abortion stance, rather than his qualifications to sit on the court (www.cnn.com/2005/POLITICS/10/31/scotus.bush.index.html 2). Examples of

opposition from other Senators on the basis of political direction of the court can be seen with comments from Senator Charles Schumer (D, NY). Schumer asserts “the initial review of Judge Alito’s record shows that there’s a real chance that he will, like Justice Scalia, choose to make law rather than interpret law and move the court in a direction quite different than it has gone”

(www.cnn.com/2005/POLITICS/10/31/scotus.bush.index.html 2). This characterization of Alito’s actions differs than that of his colleague, Justice Roberts. No statements were found characterizing Justice Roberts’ judicial philosophy in this manner. Additionally, Senator Patrick Leahy (D, VT), chairman for the Senate Committee on the Judiciary, characterized Bush’s actions as “instead of uniting the country through his choice, the president has chosen to reward one faction of his party at the risk of dividing the country” (www.cnn.com/2005/POLITICS/10/31/scotus.bush.index.html 2). Moreover, Dana Bash asserts that Sen. Leahy’s reactions and comments to the Alito nomination were quite different than that of Roberts’ nomination.

For example, the Senator asserted, "Judge Roberts is a man of integrity...I can only take him at his word that he does not have an ideological agenda"

(<http://www.washtimes.com/national/20050921-102702-8880r.htm>). This further supports the argument mentioned above that Roberts’ ability to captivate Senators was a key element in his confirmation. However, both Justices are shown to be conservative, which further illustrates the point that the replacement of swing vote and extensive judicial records, as well as timing, have played roles in the opposition to Alito. Senator Schumer’s comments on Roberts’ nomination were not much different than those on Alito. Although not as harsh in tone, Schumer asserted that Roberts was both young and

brilliant and that this mix could be dangerous to the American public if Roberts' judicial views were not firmly established

(http://www.dscc.org/news/latest/20050916_schumer/). Moreover, This statement could be tied to the lack Roberts' of judicial record.

Tied to the concept of political balance on the court is the discussion of timing of the two nominations. By being able to nominate two justices to the Court, the President may have been able to use his power to influence the Senate. For example, by replacing Chief Justice Rehnquist with an equally conservative justice, Senators on the left may have been under the notion that the President would nominate a more moderate justice to replace the moderate conservative Justice O'Connor. Instead, President Bush nominated a judge who was clearly just as, if not more, conservative in nature than the prior Justice and this, therefore, secured more opposition from the left. With the Roberts nomination, he was able to obtain half of the votes from the Democratic Senators. Left in disappointment, these Senators and other liberal interest groups threw all of their energy into defeating the President's second nominee. This opposition can be seen in the differences in the roll call votes. Senator Leahy supports this claim with his statements that he made following Chief Justice Roberts' confirmation. Leahy stated "The next one's the one everybody worries about...and again, I urge, as I have before, I urge the president to be a uniter and not a divider"

(http://www.washtimes.com/national/20050921-102702-8880r_page2.htm). An interview with an interest group spokesperson also supports the notion that Senators felt that President Bush would nominate a more moderate Justice to replace Justice O'Connor. The spokesperson suggested that Senator Obama inquired about the next

judicial appointment prior to his vote on Justice Roberts. Specifically, he inquired that if he voted to confirm Roberts, would the next nomination be more moderate? Instead, the President nominated a strong conservative judge, which accounts for some of the opposition to his confirmation.

Liberal interest groups, specifically those of environmental conservation and pro-choice nature, also strongly opposed Alito's nomination. Karen Pearl, President of Planned Parenthood, voiced the organization's concerns with allegations that "Judge Alito would undermine basic reproductive rights. It is outrageous that President Bush would replace a moderate conservative like Justice O'Connor with a conservative hardliner" (www.cnn.com/2005/POLITICS/10/31/scotus.bush.index.html 3). Their evidence for statements of this nature stems from a 1991 court decision in which Alito, dissenting alone, voted to uphold a Pennsylvania law requiring notification of the father if a woman was seeking an abortion (947 F 2d 682 3rd Cir. 1991). In comparison, Pearl also made statements on behalf of Planned Parenthood concerning Roberts that were not as harsh in tone and expressed concern with the lack of knowledge of his stance on abortion. An example of these kinds of statements can be seen when Pearl asserted after Roberts was confirmed "Planned Parenthood stands firm: reproductive rights and protections for women's health are nonnegotiable. We will find out soon where John Roberts stands on the issue" (<http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/judge-roberts-confirmed.htm>).

In terms of the abortion debate, perhaps more importantly is Alito's public stance on *Roe v. Wade*. While working as an attorney for the Department of Justice, Alito authored two memorandums in which he expressed his disagreement with the 1973

Supreme Court Case. These memos proved to be the focus of some of the justice's opposition during the confirmation process (<http://www.washingtonpost.com/wp-dyn/content/article/2005/12/12/AR2005123100328.html> 2). Moreover, Alito was questioned on his opinions of *Roe v. Wade* in his confirmation hearings. His explanation was that he was only "an advocate seeking a job" and that he was "...not an advocate, I don't give heed to my personal views, what I do is interpret the law." (<http://www.cbsnews.com/stories/2005/11/15/politics/main1044170.shtml>). By publicly expressing his views on issues that the American public has debated for years, Judge Alito supplied ammunition to groups who opposed his nomination.

Importantly, Justice Roberts' views about abortion have also been debated in the political arena. Specifically, "Judge Roberts' public positions on abortion and *Roe v. Wade* appear to be inconsistent" (http://www.issues2000.org/Court/John_Roberts_Abortion.htm). Discrepancies in the Justices' circuit court nomination hearings and his briefs written while employed as the principal deputy solicitor general illustrate these inconsistencies. Moreover, Roberts is attributed with expressing his view that the American Constitution does not support abortion. Alternatively, in his circuit court of appeals confirmation hearings, Roberts stated that he would uphold the Court's ruling in *Roe v. Wade*, in spite of his personal views (http://www.issues2000.org/Court/John_Roberts_Abortion.htm). Also, People for the American Way charged "As Deputy Solicitor General during the first Bush administration, Roberts tried to convince the Supreme Court to overturn *Roe v. Wade* in a case that didn't even directly concern that issue" (<http://www.pfaw.org/pfaw/general/default.aspx?oid=19265>). Both Justices, therefore,

have made similar statements on records concerning their stances on abortion. The difference in roll call votes, however, in part can be attributed to the concern over the political balance on the court and the more substantial evidence available on Alito. Moreover, due to the fact that O'Connor was more moderate in civil liberty issues and has been a swing vote upholding abortion rights, a nomination of a conservative who has expressed anti-abortion remarks would raise more concern.

Conservation and environmental groups such as the Sierra Club and Earthjustice were another set of interest groups opposed to Alito's nomination. Interestingly, conservation groups have not opposed a judicial nomination since Robert Bork (<http://www.ens-newswire.com/ens/jan2006/2006-01-31-04.asp> 2). Justice Alito himself was a member of the National Environmental Enforcement Council during his time with the Department of Justice (<http://www.supremecourtwatch.org/Alitofinal.pdf> 4). Historically, Republican administrations have not been sympathetic towards environmental conservation. Therefore, his membership in this council further supplied reasons for opposition of these environmental and conservation groups. Specifically, over 60 conservation groups opposed the judge's nomination to the court due to their concerns for protection of the environment and public health (<http://www.ens-newswire.com/ens/jan2006/2006-01-31-04.asp> 1). For example, Carl Pope, executive director of Sierra Club alleged, "Judge Alito poses a serious threat to the environmental protections we cherish" (<http://www.ens-newswire.com/ens/jan2006/2006-01-31-04.asp> 2). In addition, "environmental groups say they fear Judge Alito's confirmation 'poses an immediate threat to America's commitment to protecting safe drinking water and the health of the vast majority of our creeks, streams, and wetlands'" (<http://www.ens->

newswire.com/ens/jan2006/2006-01-31-04.asp 3). These groups alleged that in cases concerning these areas, Alito has had patterns of dissenting from the majority opinion. Pope also made statements regarding Roberts' confirmation. These statements, however, were not as severe in their characterization of the judicial correlation between Roberts and the environment. For instance, Pope stated, "Although Roberts does not look like an ideological extremist, when faced with a close call between public health and the environment and economic interests, he makes the close calls on behalf of regulated industries" (<http://www.sierraclub.org/carlpope/2005/07/judge-justice-roberts.asp>). Thus, Pope's statement does address some unease with Roberts' rulings and the environment. However, they do not refer to him as a "serious threat" as they do Alito.

Opposition from these environmental groups stems from their worries that Congress' ability to pass laws concerning the environment would be threatened by Alito's philosophy ([Http://www.ens-newswire.com/ens/jan2006/2006-01-31-04.asp](http://www.ens-newswire.com/ens/jan2006/2006-01-31-04.asp) 4). For example, in U.S. v. Rybar, a 3rd Circuit Court of Appeals case, Judge Alito dissented in a ruling found extremely troubling to environmental conservation groups because his placement in the Court could potentially limit the ability of Congress to protect water and air (<http://www.ens-newswire.com/ens/jan2006/2006-01-31-04.asp> 3). Specifically, the Sierra Club charged that Alito's judicial philosophy would threaten laws that protect endangered species and clean air and water (<http://www.ens-newswire.com/ens/jan2006/2006-01-31-04.asp> 4). Alito's judicial philosophy in terms of this area of the law is evident in his past rulings and can be examined using his judicial record. However, Judge Roberts has, like Judge Alito, issued troubling dissents against environmental protection (<http://www.pfaw.org/pfaw/general/default.aspx?oid=19265>).

The lack of equal environmental conservation opposition could possibly be attributed again to his short judicial record and the replacement of the former Chief Justice Rehnquist.

Justice Alito's stance on the scope of federal authority also attributed to the difference in roll call votes. The Boston Globe describes how the political climate in 2006 was full of tension between Congress and the Executive Branch as a result of President Bush's actions. Specifically, President Bush "has asserted the power to hold prisoners without trial, shield documents, and authorize aggressive interrogations without congressional approval." Senator Kennedy's (D, MA) remarks illustrate this inherent tension in relation to judicial nominations by claiming that Alito " 'raises concerns about whether he would be unduly deferential to the president' at the expense of Congress. 'One of the most important issues facing the court in the future will be the extent to which it will enforce legal limits on presidential power, particularly in the setting of foreign and military affairs'"

(http://www.boston.com/news/nation/washington/articles/2005/11/05/alito_remarks_back_ed_strong_presidential_powers/). The Senate may view Justices that are characterized as deferring to the Executive branch as a threat. Moreover, this threat can be displayed in the roll call votes. It should be noted that attempts to extract statements concerning Justice Roberts' stance on the scope of federal power proved inconclusive. Therefore, he was considerably less vulnerable on this issue.

As with Chief Justice Roberts, Alliance for Justice and People for the American Way have also published reports on Justice Alito. However, unlike the reports published on Roberts, those written concerning the Alito nomination were somewhat more severe in

their analysis. For example, they assert that Judge Alito has “aggressively sought to curb Congress’ legislative authority to tackle issues of national importance...”

(<http://www.supremecourtwatch.org/Alitofinal.pdf> 1). This tougher stance by these interest groups can be attributed to Justice Alito’s extensive record on the Court of Appeals and his replacement of a moderate conservative member of the court. In an interview with Paul Edenfield, Senior Counsel for Alliance for Justice, he confirmed this statement in an interview. Edenfield said that it was easier to target and oppose Alito due to the fact that his judicial record was so extensive (Paul Edenfield Interview 3/21/2007). Nan Aron, President of Alliance for Justice, explains this relationship with her statements following Justice Alito’s confirmation. She asserts “Today is a sad day for our country. The Supreme Court makes decisions that touch the lives of all Americans. Unfortunately, the balance of the Court has now tilted dramatically to the right, placing our fundamental rights and freedom in jeopardy” ([Http://www.ens-newswire.com/ens/jan2006/2006-01-31-04.asp](http://www.ens-newswire.com/ens/jan2006/2006-01-31-04.asp) 4).

The Preliminary Report published by Aron’s organization focused on opinions and dissents authored by Judge Alito during his work on the 3rd Circuit Court of Appeals. An analysis of different types of cases are examined and published in the report. Likewise, in her organization’s preliminary report on the judge, it describes how legal scholars who were not opposed to Justice Roberts’ nomination do not support Alito’s. An example of such a scholar is Jeffrey Rosen, who charged that Justice Alito and his “...lack of deference to Congress is unsettling”. Also, the report describes how *National Law Journal* characterizes Alito as being “...described by lawyers as exceptionally bright, but much more of an ideologue than most of his colleagues”. With these accusations, it is

easy to see how they were able to create controversy and opposition to Judge Alito's nomination.

People for the American Way also published a preliminary review of Judge Alito upon announcement of his nomination to the Court. Like Roberts' report, their report focused on Alito and issues concerning civil liberties and fundamental rights. Unlike their characterization of Chief Justice Roberts, PFAW labels Alito as having a political ideology wavering to the far right. They also assert that his opinions are troubling and that they "seek to undermine the established civil rights law". In perhaps an even bolder statement, they group asserts, "it is clear that Alito's confirmation would seriously jeopardize Americans' rights" (<http://media.pfaw.org/stc/AlitoPreliminary.pdf> 1). The two reports on both nominations appear to have a somewhat different stance in tone and composition. For example, they assert that Roberts' "...record is a disturbing one...Roberts has limited judicial experience" and "...his record indicates that it falls far short of demonstrating the commitment fundamental and constitutional rights that should be shown by a Supreme Court nominee" (<http://media.pfaw.org/roberts.pdf>). Although these statements are harsh in tone, they are clearly not as harsh as those made about Alito. Reports on Alito were also able to use his extensive record on the Court of Appeals to support their claims. As discussed previously, the preceding statements support the argument that Justice Alito's prior work experience, as well as his replacement of a moderate Republican on the bench have caused him to receive somewhat more backlash and opposition from interest groups than his fellow colleague.

An analysis of environmental factors is necessary to rule out or take into account possible outside influences on the confirmation process as a whole. One of these factors,

as was discussed in relation to Roberts, is presidential strength. By looking at the chart on the preceding page, one can see that President Bush's approval rating was in fact higher than it was during Roberts' confirmation. Therefore, one can conclude that in this circumstance, Presidential strength did not play a role.

As with the discussion of Chief Justice John Roberts and Hurricane Katrina, there were also situational factors that may have influenced Justice Alito's confirmation process. One of these factors that can be examined is the opposition from Democratic Senators of President Bush's terrorist surveillance program. Essentially, the program was used as a warrantless domestic surveillance program that proliferated heated opposition from the left in January 2006 (<http://mediamatters.org/items/200601310002>).

Theoretically, if Senators on the left were unhappy with the President's actions, they could display this disapproval in their voting patterns. Moreover, opposing Senators to Alito's confirmation may have been tied to a notion of how Alito might defer to Presidential power to their voting tendencies. This practice, although it does not in any way account for the roll call differences totally, may help to explain why only 4 Democratic Senators voted yes on Alito, while 22 of them voted yes on Roberts.

There were, however, other possible outside influences that may have had a role in the partisan opposition. For example, after President Bush nominated Harriet Miers as a replacement for Justice O'Connor, she withdrew her nomination on the speculation that several Republicans were opposed to it. Meirs herself said that she was "concerned that the confirmation process presents a burden for the White House and its staff and it is not in the best interest of the country"

(<http://www.cnn.com/2005/POLITICS/10/27/miers.nominations/index.html>). By

questioning her qualifications and degree of conservatism, Republicans opened the door for Democratic criticism of the President's next nomination as an attempt to fill the court with rigid conservative ideology in an effort to appease those on the right. Although Democrats were not as opposed to Miers as those on the right were, the right realized that O'Connor's swing vote seat needed to be filled with a conservative. Republicans questioned Miers' loyalty to the conservative cause, therefore possibly opening the doors for opposition from the left of Judge Alito's nomination

(http://www.washingtonpost.com/wpdyn/content/article/2005/10/27/AR2005102700547_2.html, Babington and Fletcher 1).

An interview conducted with an aide to a Republican Senator on the Senate Judiciary Committee further supports the argument that Meirs' nomination had an impact on that of Alito's. However, Meirs' nomination may have helped, rather than hindered his confirmation. This aide specified that it was the media that killed Meir's nomination, ultimately forcing her to withdraw. Additionally, he stated that the Democrats were opposed to Alito's confirmation, as seen with the difference in the outcome of the Senate roll call votes. However, the aide stated that it has historically been difficult for two nominations to be opposed and defeated consecutively due to lack of motivation. Without the media, the Democrats had a tougher time opposing Justice Alito. Therefore, some members of the Senate opposed Alito and this opposition may have been even greater if Meirs had not been nominated previously. (Interview 3/23/2007).

Paul Edenfield at Alliance for Justice further supported this argument in an interview. Edenfield explained how it was more difficult to oppose a second nomination for the same vacancy. Further, he stated how it did make a difference in the nomination

process that Alito was in fact the second nomination (Paul Edenfield Interview 3/21/2007). Thus, the timing of Alito's nomination, in this respect, may have aided him in the process and therefore made the gap between "yes" and "no" votes greater than it might have been if Miers' had not been nominated first.

Before an examination and discussion of the Senate Roll can occur, a summary is needed of the key factors that were involved in the discrepancies between Justice Roberts' and Alito's confirmation processes. As mentioned previously, both justices are known to come from the extreme conservative wing of the Republican Party. Therefore, the presence and combination of several key factors allowed for such a large gap in the Senate Roll call votes to take place. For example, in relation to Justice Roberts, key factors include political balance of the court, timing, lack of judicial record, the perception of his character and lack of substantial situational controversy. Also, by replacing a fellow conservative Chief Justice, the political ideology of the court was not in jeopardy. Therefore, members of the Senate saw no reason to actively oppose Justice Roberts.

Tied to composition of the court is the timing of Justice Roberts' nomination. As mentioned in the previous pages, Chief Justice Rehnquist's death left President Bush with two vacancies to fill on the court. It can be speculated that with the President's nomination of a conservative, President Bush would make his second nominee more moderate in terms of political ideology. The interview with Edenfield further supports this argument. In the interview, Edenfield affirmed that he thought Senators may have thought about this factor and that it may have been taken into account in the roll call votes (Paul Edenfield Interview 3/21/2007). Chief Justice Roberts' lack of extensive

time spent on the D.C. Circuit Court of Appeals did not produce the same judicial record of that as Justice Alito's. This allowed his nomination to be somewhat of a question mark to many Senators. Therefore, he was able to be perceived as not quite as conservative as his colleague.

In terms of situational controversy, it is well known that Justice Roberts' nomination did not create the same opposition as Justice Alito did. However, this lack of controversy was likely due to the fact that he was the first of Bush's two nominations. Moreover, Hurricane Katrina and its successful allowance of shifting the attention of the Senate, as well as the public, also played a role in the support for Justice Roberts' confirmation. With the nation in such turmoil over the disaster, perhaps an individual such as the Chief Justice would serve to bring the morale up of the citizens. Thus, it can be speculated that if Chief Justice Rehnquist had not died, Justice Roberts would have received more opposition than he had, although it still might not have been as strong as that seen with Justice Alito's confirmation. Lastly, as mentioned in the previous pages, Justice Roberts' personality can be seen as a strong influential variable in the outcome of the role call votes. Nan Aron at Alliance for Justice asserted that due to his personality and character "Senators didn't have the will to take him on" (Nan Aron Interview 3/21/2007).

Key factors and their influences on the confirmation of Justice Alito include a substantial judicial record, political balance on the Court, and judicial philosophy. As mentioned previously, Justice Alito served 15 years on the 3rd Circuit Court of Appeals before being appointed as a Justice. This lengthy tenure allowed for an extensive judicial record, that was perhaps more importantly, composed of his sometimes controversial

written decisions. This record also allowed for opposition, primarily from the left, with extraction of his voting tendencies.

Another reason for the heated opposition to Justice Alito's nomination and confirmation was the political make up of the court at that time. Justice O'Connor was seen by many as a swing vote, particularly in areas of civil rights issues. Further, by replacing a moderate conservative with an staunch conservative Justice, Democrats saw the need to rally support in opposition of Justice Alito. Tied to the Alito's record is the extraction of his judicial philosophy, which also heavily influenced opposition from the left. For example, Justice Alito's voting tendencies reveal that he has deferred to the executive branch in his prior judicial rulings. Democratic Senators who were especially troubled by President Bush's actions at that time viewed Alito as somewhat of a tool of the President. Likewise, they feared that he would give the President unconstrained power in his very decisions that they opposed, such as warrantless domestic surveillance program. Lastly, Justice Alito did not have the same ties to the Washington D.C. legal community as Justice Roberts did. Nan Aron stated that "Alito did not have Roberts' polish, venire..." and "...he had a fifteen year record" (Nan Aron Interview 3/21/2007). Ultimately, these two variables proved to be a major key to Alito's greater opposition than that of Roberts' in the Senate roll call votes.

Senate Roll Call

"With the exception to the initial announcement of a nominee's name by the president, public attention to the Supreme Court nomination process is focused mostly on the Senate confirmation hearings. They represent the most visible and formal evaluation

of the nominee's suitability and qualifications" (Slotnick 547). With these words, Watson and Stookey illustrate the importance of the Senators' roles in the Supreme Court Justice confirmation process. As mentioned in the opening pages, Watson and Stookey's study can be referenced while studying the confirmation processes of both Justices Roberts and Alito in terms of situational controversy and the Senate roll call outcomes. For example, both judges attracted attention from the public, as well as the media due to what some saw as their controversial nominations. Watson and Stookey explain how "such interest springs primarily from the uncertainty of the outcome, which derives from a division among the senators or from an apparent indecision by Senators concerning which way to vote" (Slotnick 547).

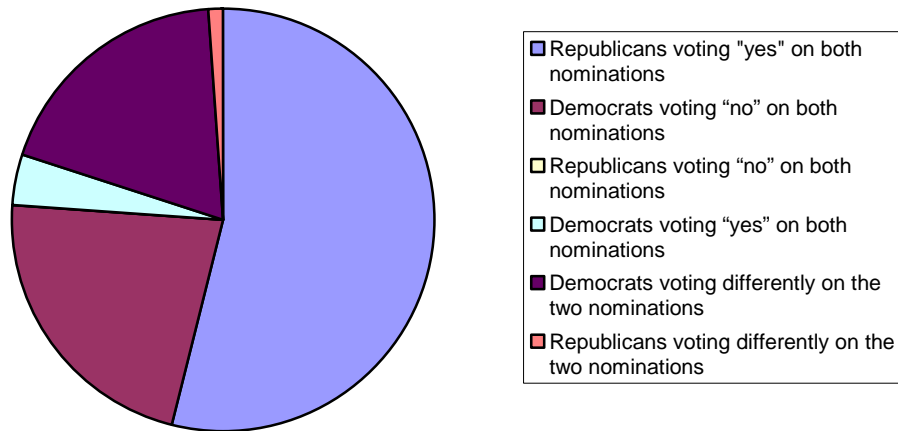
Before an examination of the roll call can take place, background information on the steps taken by Senators and their staff in reaction to a Justice's nomination need to be presented. Watson and Stookey argue that these actions are instrumental in shaping the roles that the Senators will take during the confirmation hearing. Examples of such actions are information gathering and evaluation of the political and personal environment (Slotnick 549). Senator's staff members facilitate the information gathering process, and "because of some presumption by the senators in favor of the president's choice, attention focuses on any negative factors that might alter that presumption" (Slotnick 549).

Following the primary information gathering process, information is collected from official sources, such as the Federal Bureau of Investigation's reports on the nominees. Questionnaires are also submitted to the nominee by the chief counsel on the Senate Judiciary Committee. These questionnaires inquire about biological information,

general interest questions, financial data, and conflict of interest statements. The next step in the process involves a pre-hearing private meeting between the nominee and the individual senators on the Judicial Committee. The final steps of the Senate involvement process include the actual full Senate hearing, followed by Senate roll call (Slotnick 549). However, at the final vote, Melone asserts “What is pertinent to note, however, is that all the schemes point out that past nominees were evaluated on political grounds unrelated to professional qualifications” (Slotnick 532). This argument is especially related to these two Justices due to the fact that Alito had a fifteen-year track record on the Court of Appeals, yet received less support in the voting stage of the process than Roberts did. This suggests that the Senators used other factors other than professional qualifications when deciding what the outcome of their votes would be.

This political evaluation is very much present in the six categories of votes that will be analyzed in great detail in the following pages. Four case studies will follow examining four representative Senators (Byrd, Jeffords, Leahy, Chafee) whose voting patterns placed them into groups three through six. As mentioned in the opening pages, categories one and two were the mode of data and thus will not be examined. Specifically, as Melone argues, members of the Senate tend to evaluate nominees on political grounds. Therefore, it is expected that Republican Senators would vote “yes” on both nominees and Democrats would vote “no” on both nominees. Thus, this political evaluation describes why categories one and two are the represented modes of data. Below is a chart summarizing the six categories that the Senators fell into.

Roberts and Alito's Senate Roll Call Confirmation Votes



Senator Robert Byrd (D - WV)

For purposes of analyzing Senator Byrd's voting behavior, a short biography may be helpful. Byrd was born in North Carolina on November 20, 1917. He represents West Virginia and has had a lengthy career in the United States Senate. Further, "In June 2006, Byrd became the longest serving Senator in the history of the Republic and, in November 2006, he was elected to an unprecedented ninth consecutive term in the Senate. During his tenure, his colleagues have elected him to more leadership positions than any other Senator in history. Throughout his career, Byrd has cast nearly 17,800 roll call votes" (<http://byrd.senate.gov/biography/story/story.html>). Byrd is widely known in

the Senate for his strong guard that he holds for the Constitution. Lastly, he is a member of the Committee on Appropriations, Committee on Armed Services, Committee on Rules and Administration, and the Committee on Budget within the Senate.

Senator Byrd was chosen to be a case study due to the fact that he falls outside the mode of data. Specifically, Byrd is merely one of four Senate Democrats who voted “yes” on both Justices. The others were Senator Conrad (ND), Senator Johnson (SD), and Senator Nelson (NE). Therefore, Byrd’s case is particularly interesting. What is even more startling about Byrd’s voting is the consensus among those on Capital Hill that Byrd is one of President Bush’s harshest critics

(<http://washingtontimes.com/national/20050721-115719-6891r.htm>). Watson and Stookey explain how “examination of the moderates and liberals on the committee confirms that those not in ideological ‘sync’ with the nominees were more likely to withhold support” (Slotnick 550). Byrd, however, is not in ideological “sync” with either of the nominees, yet he voted to confirm both of them. This lack of similar political ideology can be seen with reference to Senator Byrd’s Americans for Democratic Action rating. These ratings are based on the degree of support that a particular member of congress gives to votes covered by this liberal oriented organization, ranging on a scale from 0 to 100. Senator Byrd’s rating is a 95, making him strongly liberal and democratic in voting tendencies

(http://www.votesmart.org/issue_rating_detail.php?sig_id=004110M). Thus, the question as to why Senator Byrd voted “yes” on both nominees then becomes: Why?

One answer to this puzzling voting behavior concerns the issue of home state constituents. Although Senator Byrd is a member of the Democratic Party, he stated that

his home state of West Virginia favors conservative judges. Seeing as though he is a represented governmental official, the view can be taken that it is his duty to protect the interests of his home state constituents. Moreover, it is these very citizens who elected him into office, and therefore it seems logical that he would cast a vote that is consistent with the opinions of his home state populace. Related to this idea is the importance of reelection in the West Virginia home that Senator Byrd represents. For example, at the time of Justice Roberts' nomination, Byrd's home state approval rating fell below 50 percent. Combined with the notion that his political opponent in the state, Representative Shelly Moore Capito, was only three mere points behind the incumbent Senator (<http://washingtontimes.com/national/20050721-115719-6891r.htm>). His voting on the two nominations, therefore, can be viewed as an effort to please his home state constituents, who have been shown to support the confirmation of conservative judges. Thus, this statement can be used to answer why a Democratic Senator with a liberal voting rating of 95 would vote to confirm two widely known conservative Justices to the Supreme Court (<http://www.adaction.org/ADATodayVR2005.pdf>).

To aide with the analysis of Bryd's votes, an examination of his statements made concerning the two nominations can be used to provide further evidence for Byrd's voting. For example, in announcing his views on Justice Alito, Byrd asserted that in his eyes, there was a substantial flaw in the nomination process, specifically within the Senate, and that fellow Senators should not take into account political party affiliations in their voting process. He further stated how he "refuse(s) to simply toe the Party line when it comes to Supreme Court Justices". Additionally, Senator Bryd has also stated "It is imperative that the American people have faith in the Justices of the Supreme

Court. To help ensure that belief, the Senate needs to do all that it can to avoid extreme partisan confirmation battles” (http://byrd.senate.gov/speeches/2006_january/alito.html).

Interviews conducted with members of Alliance for Justice further can be tied Byrd’s bipartisan stance on judicial confirmation. Specifically, Nan Aron asserted “Senator Byrd, generally speaking, defers to the President on judicial nomination and has always been one of the Democrats very reluctant to challenge a president either Democrat or Republican on judicial nominations” (Nan Aron Interview 3/21/2007). Thus, her statements, as well as those by Senator Byrd, can be used to summarize a major influence on Senator Byrd’s voting outcome in these two particular confirmation processes.

In summary, Senator Byrd’s voting tendencies, in terms of the Senate roll call votes, can be attributed to a combination of two specific variables. These variables include home-state political concerns and his outlook on the confirmation process as a whole. Home state concerns, whether simply representing the conservative appointment of judges to federal courts or reelection concerns, have shown to be a reason for the outcome of his two votes. However, these home state concerns were not the only factor present in his decision to vote “yes” on both nominees. Instead, these concerns combined with Byrd’s philosophy on the Senate’s role in the confirmation process of federal judges in general. Further, Byrd has stated himself that he longs for a bipartisan effort to unite the Senate and confirm nominations. Lastly, an interview with the Nan Aron suggests that as a whole, Senator Byrd defers to the President in terms of nominations to the Court.

Senator James Jeffords (I - VT)

Senator Jim Jeffords was born in Vermont on May 11, 1934. Jeffords served in the Senate from 1988 through 2006 representing his birth state. Due to the health of his wife, Jeffords decided to not run for reelection in 2006.

(http://www.boston.com/news/nation/articles/2005/04/21/jeffords_will_not_seek_reelecti on/). Jeffords was originally elected as a Republican candidate, but later became an Independent Senator in June of 2001. During his tenure in the Senate, Jeffords was a member of the Committee on Environment and Public Works, Committee on Health, Education, Labor and Pensions, and the Committee on Labor and Human Resources (<http://bioguide.congress.ov/scripts/biodisplay.pl?index=J000072>).

Due to Jeffords' Independent status, as well as his inconsistent voting on the two nominees, he was chosen for a case study. However, it is important to note that although he was an independent, for purposes of this study, he was counted and treated as a Democrat. This is due to the fact that he caucused with the Democrats. He has an ADA rating of 90, making him quite liberal (<http://www.adaction.org/ADATodayVR2005.pdf>). Jeffords' voting on the confirmation of the two Justices places him in category five of the data. Specifically, he voted "yes" on Roberts and "no" on Alito, which, as explained previously, falls outside of the mode of data. As with the analysis on Senator Bryd, statements made by Jeffords himself will be helpful in explaining his voting behavior. In turn, these statements can be traced back to some of the overall conclusions discussed previously as to why the voting outcome was so different between the two nominees. For example, in Jeffords' statements concerning his vote on Chief Justice Roberts, he declared, "from the record we have, nobody has raised a question on whether Judge

Roberts has the proper legal experience or character to be the next Chief Justice of the United States Supreme Court. It also appears to me from a review of his judicial decisions that Judge Roberts has not allowed his personal beliefs or ideology to influence his decision-making process” (http://jeffords.senate.gov/~jeffords/press/05/09092805roberts_vote.html). Jeffords also stated that he felt Justice Roberts further reinforced these thoughts in his statements to the Senate Judiciary Committee and while being questioned, he provided direct answers to these questions. As argued in the previous pages, Justice Roberts’ lack of judicial record aided him in being confirmed with more ease than Alito. Likewise, if Roberts would have had the same lengthy experience on the Circuit Court of Appeals as Alito had, perhaps these statements made by Jeffords would have been different in tone.

Compare Jeffords’ statement on Roberts with a few concerning Alito’s confirmation. For example, Jeffords asserted that if Alito were to be confirmed, he felt that “...our country would be ill-served by his judicial philosophy at this critical point in time. This philosophy would grant too much authority to one branch of government at the expense of others”

(<http://jeffords.senate.gov/~jeffords/press/06/01/012606alitovote.html>). Jeffords also acknowledged, “While many of my colleagues will disagree with my assessment of Judge Alito, this will be a lifetime appointment and a lifetime is too long to be wrong”

(http://jeffords.senate.gov/~jeffords/press/06/01/013006alito_floorstatement.html).

However, this statement seems puzzling due to the fact that both justices were conservative in nature. Therefore, what accounts for the sudden change in the tone of the statements concerning the two nominations? The answer lies, in part, in the availability

for Senators, including Jeffords, to examine Justice Alito's lengthy history of judicial voting. Therefore, Jeffords was able to make a judgment concerning the characterization of Alito's judicial philosophy. Moreover, he was able to point to the evidence to verify his characterizations. Jeffords also expressed his concern over Alito's deference to the executive branch, which is also examined in the previous pages. In a time where bitter bipartisan battles were present over actions taken by President Bush, Alito's past decisions further allowed for him to gain more opposition in the roll call votes.

Another reason for the difference in Jeffords' voting relates to the idea of personal character of the two nominations. Recall the discussion in the previous pages concerning the ability of Justice Roberts to capture an audience with his polished demeanor. Additionally, this trait was present during the hearings, allowing Senators to feel as though Roberts answered questions more directly than Alito did. Jeffords addressed this issue when he stated "Judge Alito did not provide complete answers on many important topics the way now Chief Justice Roberts did during his nomination hearing" (<http://jeffords.senate.gov/~jeffords/press/06/01/013006alito floorstatement.html>). This polish, or lack thereof, appears to have allowed for the nominees to leave differing impressions on the very Senate that votes to confirm them.

Lastly, former Senator Jeffords expressed concern over the notion of political balance on the Court and sighted this concern has having an impact on his "no" vote. Jeffords illustrated this concern directly when he declared "I have concluded that the addition of Judge Alito to the Supreme Court would unacceptably shift the balance of the Court on many critical questions facing our country..." (<http://jeffords.senate.gov/~jeffords/press /06/01/013006alito floorstatement.html>).

Replacing a conservative Chief Justice Rehnquist with a conservative Chief Justice Roberts would have little impact on the voting behavior of the Court as a whole. However, as previously discussed, the replacement of a moderate swing vote Justice O'Connor with a conservative Justice Alito had the ability to alter the overall political balance of the Court. Clearly, Senators, including former Senator Jeffords took this notion into account, ultimately affecting his overall votes.

Concisely, as with Senator Byrd, a combination of distinct variables can be used to explain former Senator Jeffords' voting behavior in the roll call votes for both nominees. These variables include personality and character of the Justices, length and substance of judicial voting records, and political balance on the Court. Chief Justice Roberts has shown to possess somewhat of an advantage over his colleague due to his personal character. This edge clearly benefited him in his confirmation votes within the Senate. Further, this argument is supported by the declarations that Jeffords made concerning the differences in the way he characterized both nominees during the hearings. Justice Roberts' lack of judicial record, and correspondingly Justice Alito's extensive one, noticeably played a role in Jeffords' overall voting on the two nominees. Due to Alito's abundant record, Jeffords was able to point to past decisions in an effort to support his "no" vote. Lastly, political balance was also key in Jeffords' "no" vote to Alito and is further supported by previous statements Jeffords made.

Senator Patrick Leahy (D – VT)

Senator Patrick Leahy was born on March 31st, 1940 in Middlesex Vermont (http://www.vote-smart.org/bio.php?can_id=S0890103). Leahy was elected to the United

States Senate by the voters of Vermont in 1974, and is the youngest Democrat to serve in the Senate from Vermont. He is a ranking member on the Judiciary Committee, as well as a member of the Homeland Security Defense and Interior Subcommittees. He was heavily involved with the USA Patriot Act, where he had ensured the addition of checks and balances to the bill. In addition, Leahy is concerned with the flaws of the capital punishment system in the United States and is the principal backer of the Innocence Protection Act (<http://leahy.senate.gov/biography/sketch07index.html>).

Senator Leahy was chosen for this case study for the reason that he has a larger role in the confirmation process as a whole. Likewise, he was also chosen due to his vote of “yes” on Roberts and “no” on Alito. This voting discrepancy places him outside the mode of Senate roll call data, thus making him of interest to the study as a whole.

Moreover, Senator Leahy was the first among his fellow Democratic Senators to support President Bush’s nomination of Judge Roberts. This is quite startling due to the fact that his ADA rating is 100, making him extremely supportive of the values of the liberal group, Americans for Democratic Action

(http://www.votesmart.org/issue_rating_detail.php?sig_id=004110M). Therefore, the question becomes, as with Senator Jeffords, why would Leahy vote differently on two nominations who were both conservative in nature? Dr. Elliot Slotnick’s interview with a high ranking Democratic counsel to a Senate Judiciary Committee member, provides insight into the discrepancies between Leahy’s voting on the two nominees.

The counsel explained how Senator Leahy felt that the next Chief Justice should not be decided on the basis of political party affiliation. He also stated how Leahy spent a lot of time on the Roberts’ nomination, specifically spending personal time with him

and critically evaluating his responses at the hearings. However, the counsel did not discuss these same factors in terms of Alito (Slotnick Interview). In addition, Leahy himself states that his conscience led him to his “yes” vote on Roberts and that he “took Judge Roberts at his word when he gave the Committee assurances that he would respect Congressional authority” (<http://leahy.senate.gov/press/200509/092605.html>). Leahy also stated that both he and Roberts shared appreciation for Justice Robert Jackson, which further enabled Roberts to secure a “yes” vote from Leahy (<http://leahy.senate.gov/press/200509/092605.html>). These statements can be tied to the discussion regarding Robert’s character and his ability to captivate and win over the very Senators who would ultimately vote to confirm him. Likewise, the personal time spent between the two further enabled Roberts’ character to shine through and help confirm a “yes” vote for himself. Alito, as illustrated in the preceding pages, did not have these polished attributes, which can be used, in part, to explain Leahy’s “no” vote on him.

Other variables that were influential in Leahy’s decision to vote “yes” on Roberts were the political balance of the Court, Roberts’ lack of judicial record, and his deferment to the executive branch. With the lack of a judicial record, Leahy was able to trust in Robert’s words and thus vote to confirm him. Thus, if Roberts would have had the same extensive record as that of Alito, his statements may not have been seen as credible to Senator Leahy. Leahy made statements concerning Judge Alito’s record and his disapproval of his judicial decisions. The Senator stated “We know that Judge Alito has advocated his personal legal view about the Unitary Executive theory in public remarks he made just a few years ago, as a sitting judge” (<http://leahy.senate.gov/press/200601/011106.html>). This statement illustrates the notion

that although Alito may have said differently in his meetings and hearings, ultimately it was his record that would serve as his own political litmus test.

Leahy's statement can also be tied to another key variable used to explain Leahy's voting, the issue of executive deference. Separation of powers, with an emphasis on a Judicial Branch that is independent to that of the Executive, is a very important facet of the American government to Senator Leahy. Consequentially, Leahy was able to use Alito's record in an effort to support his "no" vote due to his uneasiness with Alito's disproportionately strong support of the executive branch. Additionally a critically important event transpired during Alito's nomination that spawned criticism from Leahy: President Bush admitted to the warrantless electronic surveillance that he personally authorized. This further enabled Leahy to see Alito as an actor in a governmental process that would continue to support the same such executive actions that he strongly disapproved of.

Senator Leahy alluded to the concept of political balance in the Court during his statement on the Nomination of Roberts. Leahy asserted "With this vote, I do not intend to lend my support to an effort by this President to move the Supreme Court and the law radically to the right. Above all, balance and moderation on the Court are crucial" (<http://leahy.senate.gov/press/200509/092105.html>). These words suggest that Leahy possibly did not think that Roberts' replacement of Rehnquist would alter the principle political make-up of the Court. On the contrary, Leahy stated "As the Senate prepares to vote on President Bush's current nomination – his third – for a successor to Justice O'Connor, we should be mindful of her critical role on the Supreme Court. Her legacy is one of fairness that I want to see preserved. Justice O'Connor has been a guardian of the

protections the Constitution provides the American people” and that “no President should be allowed to pack the courts” (<http://leahy.senate.gov/press/200601/013006b.html>).

Leahy made no reference explicitly to the difference in replacement of Chief Justice Rehnquist by Judge Roberts. Therefore, political balance on the Court was taken into account in the voting roll calls by Senator Leahy.

In sum, it seems as though three key factors can be used to explain the difference in of Senator Leahy’s votes among the two Justices: the political balance on the Court, the personnel character of the Justices, and judicial philosophy in terms of judicial executive deferment. Ultimately, it was Roberts’ polished and eloquent character that helped garner him a “yes” vote from Leahy. Conversely, Alito’s extensive record and judicial philosophy are what accounted for the decision of Leahy to vote “no” on his confirmation.

Senator Lincoln Chafee (R - RI)

Former Senator Lincoln Chafee was born on March 26, 1953 in Warwick, R.I. He served as Rhode Island’s Junior Senator from November, 1999 to January, 2007. However, Chafee’s path to the Senate differs from those in the previous three case studies. Specifically, due to the death of his father, and consequently the vacancy in the Senate that his death left, Chafee was appointed to replacement for his father’s seat. He was ultimately unsuccessful in his 2006 attempt at reelection (<http://projects.washingtonpost.com/congress/members/c001040/>). During his tenure in the Senate, Chafee served on the Environment and Public Works Committee

(<http://epw.senate.gov/members/members.htm>) and the Foreign Relations Committee (<http://www.thewashingtonnote.com/archives/001629.php>).

In relation to this study, Chafee voted “yes” on Roberts and “no” on Alito. Moreover, he was the only Republican Senator to do so. This out of ordinary voting behavior places him well outside the mode of data and thus, he falls into Category 6. Moreover, this former Senator is known for disagreeing with members of the Republican Party and has been labeled as a moderate Republican by many. Examples of this can be seen by looking into Chafee’s voting record. Specifically, Chafee opposed domestic wiretapping and “was the only Senate Republican to oppose the Iraq war resolution” (<http://www.washingtonpost.com/wp-dyn/content/article/2006/04/13/AR200604130017>). By looking at his ADA rating, a more comprehensive outlook of his political ideology and voting patterns can be extracted; Chafee registered an ADA rating of 75. Moreover, he was considered the most liberal Republican by the organization (<http://www.adaction.org/ADATodayVR2005.pdf>). Thus, although he is a member of the Republican Party, he was still rather liberal in his voting. This rating, moreover, can account for one reason as to why he was the only Republican Senator to not offer support for Alito. For these reasons, Chafee was chosen as a case study.

As with the preceding three Senators used as case studies, Chafee made statements on the congressional record and in the media concerning his positions on both Roberts and Alito. As one would expect, these statements differed in tone depending on the nominee. In terms of Roberts, Chafee stated “...Judge Roberts is an extraordinary accomplished man with the right temperament” (<http://chafee.senate.gov/public/index.cfm?IsPrint=true&FuseAction=Speeches.Details>).

Contrast these statements with those made by Chafee concerning the nomination of Alito. He asserted “The President did win the election...I am a pro-choice, pro-environment, pro-Bill of Rights Republican, and I will be voting against this nomination”

(<http://www.nytimes.com/2006/01/30/politics/politicsspecial1/30cnd-alito.html>). Chafee also stated that “In particular, I carefully examined his record on Executive Power, women’s reproductive freedoms and the commerce clause of Article one, Section Eight of the Constitution...Judge Roberts was willing to call Roe vs. Wade ‘settled law’ but Judge Alito refused to make a similar statement.”

(<http://chafee.senate.gov/public/index.cfm?FuseAction=PressReleases.Print&PressRelease>).

I had the pleasure of interviewing former Senator Chafee via telephone and was able to directly inquire about his voting behavior. He confirmed the above statements, as well as offered other explanations for his voting behavior. This method of interviewing the actual individual who cast the votes allows for more accurate information to be analyzed and offered in support of the central thesis. In general, Chafee stated that, in terms of placing his two votes, he “took the politics out of it”. He stated that he knew that his votes would anger the citizens in Rhode Island on both sides of the political spectrum, and he tried to remove the politics from the process and voted the way that he felt was best. Specifically, I asked him why he voted “yes” on Roberts. Chafee responded that the American voting public had spoken when they elected President Bush into office and that his “yes” vote was a reflection of this. Moreover, he responded that due to the fact that Bush was voted into office and was now the leader of this country, his “yes” vote was a type of deferment to the elected leader of this country.

In terms of his “no” vote on Alito, Chafee asserted that there were key variables that affected the outcome of his vote. The variables that he stated included balance on the court, the issue of the commerce clause, abortion and civil liberties. As discussed previously, replacing Justice O’Conner with Alito affected the political balance of the Court. Moreover, Chafee stated that this notion heavily played in the outcome of his decision. Chafee also stated that the issues of abortion, civil liberties and the commerce clause were important in his decisions. In addition, he explained that he even worked with fellow Senator Olympia Snowe (R – Maine) on the pro-choice abortion front during Alito’s nomination in an effort to raise awareness for Alito’s anti-abortion stance. During the interview, he explained that these factors would be jeopardized if Alito was voted onto the Supreme Court and that, consequently, they also affected his “no” decision.

Lastly, the interview ended with responses to questions concerning the outcome and backlash of his voting. Chafee stated that following his “no” vote on Alito, he received telephone calls from fellow members of the Republican Party stating that they were done with him. He does not, however, attribute his recent election loss to his “no” vote on Alito and stated that the people of Rhode Island were simply more affiliated with the Democratic rather than the Republican Party (Chafee Interview 3/14/2007).

In conclusion, former Senator Chafee is an interesting part of the roll call population in that he was the only Republican to vote “no” on Alito. His behavior, nonetheless, can be explained by public statements and my interview. In terms of his vote on Roberts, Chafee himself explained it as a vote respecting the American public’s action of voting President Bush into office. On the contrary, Chafee asserted that there were key influences that account for his “no” vote. These variables included the political

balance on the Court, abortion, civil liberties, and commerce clause issues. Likewise, Chafee felt that Alito would threaten these issues and protections afforded to the American public.

Conclusion

In conclusion, although both justices are from the conservative wing of the ideological spectrum, a 20 vote discrepancy still exists in their Senate roll call votes. This discrepancy can be explained with the overall hypothesis for the study, which asserts that a combination of variables, rather than one single factor, accounts for the discrepancy in the Senate roll call votes following both Chief Justice Roberts and Justice Alito's confirmation hearings. Moreover, this central argument is supported within the previous pages. These variables include: the character and personality of the nominees, judicial philosophy, the timing of their nominations, the record created by their prior written opinions, interest group politics and the political balance on the court at the time of their nominations. One variable, however, that I thought would make a difference was the concept of Presidential approval ratings but its effect on the confirmation of a nominee did not prove to affect the outcome of the two roll call votes. The aforementioned influential variables, however, combined in a variety of facets to influence both confirmation processes. Although these variables differed from Senator to Senator, which can be seen examining the four diverse case studies, they all ultimately affected the Senate roll call votes on the two Justices.

As a whole, a number of statements elevate themselves to the forefront in summing up the principle issues at hand. The elevation of Roberts to succeed Rehnquist

failed to alter the political makeup of the Court with respect voting alignment, thus significantly easing the process by which he was confirmed. The general consensus among the Senators at the time of the Roberts confirmation that in the unexpected event of a second seat becoming open, this second nominee (which ultimately proved to be Alito) offered up would be a more moderate choice also played a role in the Roberts voting. Roberts' lack of a lengthy judicial record further allowed him to be perceived as a judicial question mark. Hurricane Katrina also aided in what resulted by shifting the attention of both the Senate and the American public, thus allowing Roberts to be confirmed with greater speed and ease. Additionally, Alito lacked the polish and engaging personality that Roberts has and Roberts had more contacts within the Washington D.C. legal community than Alito did. Finally, Alito's lengthy 15 year 3rd Circuit Court record allowed opponents from the ideological left to extract voting tendencies and bring his more controversial rulings to the attention of the public. On one parting note, one way to further this topic of interest would be to compare the next vacancy's nomination on the Supreme Court with those of Chief Justice Roberts' and Justice Alito's. Perhaps with a further enhanced sample size in addition to the presence of other variables, a more comprehensive picture of the confirmation process as a whole would emerge and further support this research.

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